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Permission Granted: The Requirement of Consent Under the Louisiana Mineral Code

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INTRODUCTION[1]

The adoption of the Louisiana Mineral Code represents the culmination of a decades-long effort to codify the law of Louisiana pertaining to mineral rights, including oil and gas, as such legal rules and precepts had been developed judicially for seven and a half decades after bringing in the first commercial well in Louisiana.[2] Until the Mineral Code was enacted,[3] the Louisiana Legislature had adopted very few statutes addressing the needs or exigencies of this important industry.[4]

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1. Portions of this Article are taken from PATRICK S. OTTINGER, LOUISIANA MINERAL LEASES: A TREATISE (Claitor's Law Books & Publishing Division, Inc. 2016) [hereinafter OTTINGER, MINERAL LEASE TREATISE], principally by way of adaptation, reorganization, and supplementation.

2. *See* Patrick S. Ottinger, *From the Courts to the Code: The Origin and Development of the Law of Louisiana on Mineral Rights*, 1 LSU J. ENERGY LAW & RESOURCES 5 (2012).

3. Title 31, Louisiana Revised Statutes, enacted by Act No. 50, 1974 La. Acts Vol. III, effective January 1, 1975.

4. *See, e.g.*, Rives v. Gulf Ref. Co., 62 So. 623, 624 (La. 1913) ("The Legislature up to this time has been silent upon the subject of mineral rights and contracts."); Spence v. Lucas, 70 So. 796, 798 (La. 1916) ("Until the Legislature shall have passed laws specially applicable to the industry of mining, which is a new one in this state, the parties engaged in those pursuits and the courts of the state will adhere to the jurisprudence on the subject, and treat mineral contracts as

The oil and gas industry was launched in Louisiana at a time when the laws of our state were quite lacking in statutory or codal rules to regulate or manage that nascent industry. As noted by one early commentator:

> The discovery of oil in Louisiana found the State with no mining laws, as that industry was unknown in this section. The few antiquated sections of the Codes and statutes which might apply were evidently casual and accidental expressions and illustrations enacted without the remotest idea that they would ever apply to the production of oil and gas.[5]

For the most part, the Code constitutes a codification of the decisions of the Louisiana Supreme Court on an array of matters involving mineral rights.[6] Indeed, the seminal legislative action that put the codification movement into motion was a Joint Resolution of the Louisiana Legislature adopted as Act No. 170 of 1936, in which it was determined that appointing a Commission will be the Governor's duty. This Commission had the duty to draft a Code "to be known as 'A Code of the Oil, Gas and Mineral Laws of the State of Louisiana.'" The stated purpose of this Code was to codify all Louisiana laws "relative to the private ownership, leasing, selling, mortgaging of oil, gas and other minerals, or otherwise dealing therein, and rights relating thereto or connected therewith."[7]

The Louisiana Mineral Code manifests a robust respect for the policy of "freedom of contract" and serves as a primary source of law because it

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leases."); Tyson v. Surf Oil Co., 196 So. 336, 343 (La. 1940) ("Having declined to enact laws for the regulation of the oil industry and, particularly, having declined to adopt a Mineral Code, the Legislature has placed the stamp of approval upon the system of interpretation of oil and gas contracts which this court has followed for so many years."); and Reagan v. Murphy, 105 So. 2d 210, 216–17 (La. 1958) ("Without legislative guidance in the main, and utilizing codal articles devised when the existence of modern oil development was unimagined, the court has properly taken into account the general public interest of the commonwealth when resolving by civilian principles the competing interests of the landowners and of the oil-producers and their financiers.").

5. GEORGE G. DIMICK, LOUISIANA LAW OF OIL AND GAS 3–4 (1922).

6. Preface, MINERAL CODE OF 1974, 1974 La. Acts (Vol. III) xi ("The Mineral Code is designed in large measure to supplant by way of codification the extensive jurisprudence that developed in this area of the law. Louisiana's existing mineral law was a product of jurisprudential development principally by way of analogy to the provisions of the Louisiana Civil Code relating to servitudes but including particularly also the general rules of conventional obligations and leases.").

7. Act No. 170, 1936 La. Acts 495.

exclusively governs matters specifically regulated by the Code but allows for the relevance or application of "other laws"—principally the Louisiana Civil Code—in matters in which the Mineral Code does not address a particular subject.[8]

Several articles of the Mineral Code contain a reference to obtaining—or not obtaining—the consent of a third person.[9] Where a particular action or permission is contingent upon obtaining the consent of some other person, the obtention of such permission from the person whose interest is to be protected constitutes a "predicate" that must be met or satisfied in order for the stated consequence to be achieved or realized.[10] In other words, it is necessary to establish or confirm either the existence or absence of a certain set of operative facts—the granting or denial of consent—for a certain codal provision to be made applicable or operative.

SCOPE OF ARTICLE

This author is unaware of any academic examination of the entirety of the Louisiana Mineral Code as it relates to the discrete instances where the codal text makes it necessary—or dispenses with the necessity—to obtain the consent of a particular person for the conduct of a particular activity, the taking of any action, or the realization or avoidance of a stated consequence.

Although the absence of existing commentary on this topic has not proven to be problematic, it is hoped that this examination will be helpful to the industry as it pertains to the meaning and workings of the articles considered herein. Certainly, in the several instances where the Mineral Code requires consent, the parties in a mineral rights relationship need to have a basic understanding of the rights of the person whose permission is needed so that proper planning might be invoked.

This Introduction "sets the table" to consider the references to consent in the context of the Mineral Code articles. In Part I of this Article, the

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8. LA. REV. STAT. ANN. § 31:2 (2000) (Supp. 2019) ("The provisions of this Code are supplementary to those of the Louisiana Civil Code and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable."); *see also infra* note 57.

9. Ten articles contain a requirement that consent be obtained, while four articles dispense with the need to obtain consent.

10. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 2-06, relative to the role of the "predicate."

provisions of the Louisiana Mineral Code that contain a reference to a requirement to obtain someone's consent—or a statement that consent is unnecessary—for a certain consequence to arise or be avoided are examined in detail. This investigation is accompanied by an explanation of the purpose, import, or rationale for such consent, or for the dispensation thereof. Part II takes up the notion of consent as employed in the Mineral Code and examines the form or manifestation of consent where required, as well as certain temporal aspects thereof. Finally, in the Conclusion, certain observations are made based upon the review of the pertinent articles relative to the notion of consent under the circumstances presented therein.

I. RELEVANT CODAL ARTICLES REQUIRING OR DISPENSING WITH THE CONSENT OF ANOTHER

Fourteen articles of the Louisiana Mineral Code contain either a textual requirement that the consent of a certain party must be obtained by the person seeking to act or to enjoy a described benefit, or a statement that such permission is not required. In instances requiring a person's consent, the text of each article sufficiently identifies the person whose consent is necessary, and the interest of such person is apparent.[11]

In some instances, the word "consent" in an article is used as a noun—a thing or circumstance to be sought or obtained[12]—while in others, it operates as a verb—the act of seeking the expressed grant of that thing or circumstance.[13] These 14 articles are reviewed primarily in the order in

11. Purely by way of illustration, the articles that regulate the relationship between co-owners of land or of a mineral servitude require a certain level of consent of all co-owners in an attempt to respect minority rights, but also to allow the will of a stated majority of co-owners to undertake certain actions on or in respect of the co-owned thing.

12. "Consent" is used as a noun in article 50 ("*Consent* of the party conducting them is not required."); article 112 (". . . with the *consent* of the owner of the executive right, ..."); article 146 (". . . by their express or implied *consent* . . . ."); article 147 (". . . removed by the lessee without the *consent* of the lessor, ..."); articles 164, 166, and 175 (". . . without the *consent* of co-owners . . . ."); articles 165 and 170 (". . . The *consent* of the co-owner of the party . . . ."); articles 17 and 177 (". . . without the *consent* of his co-owner."); article 190(B) (" . . . without the *consent* of the naked owner."); and article 195 (" . . . without first obtaining the *consent* of the usufructuary.") (emphasis added).

13. "Consent" is used as a verb in article 85(5) (". . . unless the royalty owner is a party to the act or otherwise *consents* expressly and in writing to become bound by it.") and articles 164, 166, and 175 (". . . co-owner of the servitude who does not *consent* . . . .") (emphasis added).

which they appear in the Mineral Code (subject to a grouping for a logical discussion of similar provisions) and are examined in detail in an attempt to discern the nature, purpose, and role of "consent" in each article in which consent is required or is rendered unnecessary.

A. Article 50[14]

In a departure from prior jurisprudence,[15] a series of articles in the Mineral Code permit a servitude owner to "adopt" the operations of another person to benefit from such use as a mode of interrupting prescription.[16]

The first occasion to address the notion of consent is set forth in Mineral Code article 50, which establishes an exception to the fundamental proposition, announced in article 42, that "use of a mineral servitude must be by the owner of the servitude, his representative or employee, or some other person acting on his behalf."[17] Article 50 reads as follows:

> Art. 50. Adoption a matter of right
>
> The servitude owner may adopt the operations of another as a matter of right. Consent of the party conducting them is not required.[18]

As used in this article, the term "operations" "relates . . . to the physical activity associated with the attempt to discover or maintain production."[19] Adoption of operations means that the servitude owner manifests an intention to benefit by the interruptive effect of the operations conducted

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14. *See* PATRICK S. OTTINGER, LOUISIANA MINERAL LAW TREATISE, *Chapter 4, Mineral Servitudes* § 412 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012) [hereinafter OTTINGER, MINERAL LAW TREATISE].

15. The comment to article 53 of the Mineral Code states that its purpose is to negate the rule of *Nelson v. Young*, 234 So. 2d 54 (La. 1970). In that case, while not stated to be based on any notion of consent, the Court found that the owner of a mineral servitude "acquiesced" by its silence to the landowner's granting of a mineral lease under which operations were conducted and that a quasi-contract arose such that prescription was interrupted. *Id.* at 62.

16. LA. REV. STAT. ANN. §§ 31:44–53 (2000) (Supp. 2019).

17. *Id*. § 31:42. Article 43 enumerates the types of persons who are deemed to be acting on behalf of the servitude owner. *Id*. § 31:43.

18. *Id*. § 31:50.

19. Bouterie v. Kleinpeter, 247 So. 2d 548, 555 (La. 1971).

by another person not within the contemplation of articles 42 and 43, with certain consequences resulting therefrom.[20]

The reason that the Code dispenses with the need to seek or obtain the consent of the operating party is explained in the comment to article 50:

> The motive for Article 50 is to make the opportunity to adopt operations of another a reality. If this Article were not adopted, it might be possible for a party drilling a well or opening a mine to attempt to deny the servitude owner the right to adopt the operations or at least to delay his adoption and possibly promote the extinction of the servitude. The servitude owner should not be made vulnerable to such possible conduct.[21]

The party who undertakes the "operations" on lands burdened by a servitude that is not subject to a mineral lease has made a decision to expend its capital and to solely assume the cost, risk, and expense of the operation. Because the actor undertakes the actions either in disregard—or without consideration—of the rights of the servitude owner, the actor should not have the power or ability to deny the servitude owner the right to adopt such operations to the extent that they constitute a "use" of the servitude for the purpose of interrupting prescription accruing against this real right.[22]

Additionally, because the servitude owner who adopts the operations of another thereby commits itself "to pay his proportionate share of the reasonable, actual costs of development and operation of the well,"[23] any requirement that the servitude owner must first seek the consent of the drilling party would create an opportunity for the latter to "run out the clock" by withholding its consent until the resolution of any dispute or disagreement—legitimate or pretextual—over well costs for which the adopting servitude owner is personally responsible. The drilling party

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20. *See* LA. REV. STAT. ANN. §§ 31:48–49 (pertinent to the responsibility for costs assumed by the servitude owner who adopts the operations conducted by another).

21. *Id*. § 31:50 cmt.

22. It should be noted that "[w]hen drilling or mining operations or actual production otherwise sufficient to interrupt prescription takes place on a compulsory unit including all or a part of the land burdened by a mineral servitude, an interruption of prescription takes place without formal adoption by the owner of the servitude." *Id*. § 31:47.

23. *Id*. § 31:48. An exception to this requirement exists under article 47 in the case of "drilling . . . operations or actual production otherwise sufficient to interrupt prescription [that] takes place on a compulsory unit including all or a part of the land burdened by a mineral servitude." *Id*. § 31:47.

undertook the operation at its own cost and expense, and to require the servitude owner to get permission of the drilling party to pay it money would create an illogical opportunity for mischief, a proposition rejected by the redactors in dispensing with the need to secure the drilling party's consent.

B. Article 85[24]

A mineral royalty is one of the three "basic" mineral rights that might be created by a landowner.[25] The Mineral Code perpetuates the jurisprudence that acknowledges that a mineral royalty is a passive right entitling its owner to share in production brought about by the actions of another.[26] The Mineral Code embraces the salient aspects of the Louisiana Supreme Court decision that recognized the prescriptible nature of a mineral royalty, *Vincent v. Bullock*.[27]

A mineral royalty, by nature, is inferior to a mineral servitude.[28] The former right is purely passive because the holder of a mineral royalty must await the actions of another and, importantly, the expenditure of money by that other; the latter mineral right actually authorizes its holder to go onto a tract of land and conduct drilling operations in an attempt to discover and produce minerals. Because the mineral royalty is inferior to the mineral servitude and is often dependent upon the existence of the servitude for its own duration,[29] the servitude owner has opportunities for mischief by taking actions that invoke the law of confusion to extinguish the inferior right of royalty.

Article 85 of the Mineral Code enumerates the bases on which a mineral royalty will extinguish. Of particular relevance to our present

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24. *See* OTTINGER, LOUISIANA MINERAL LAW TREATISE, *supra* note 14, § 510(2).

25. "The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease." LA. REV. STAT. ANN. § 31:16.

26. *Id*. § 31:81.

27. Vincent v. Bullock, 187 So. 35 (La. 1939). *See* LA. REV. STAT. ANN. § 31:85(1).

28. Horton v. Mobley, 578 So. 2d 977, 983 (La. Ct. App. 2d Cir. 1991) (citing Continental Oil Co. v. Landry, 41 So. 2d 73 (La. 1949)) ("A mineral royalty is not a servitude, but a passive, non-cost bearing interest and an inferior and conditional real right which entitles the owner *only* to participate and share in the gross *production* of minerals from another's land or from land subject to a mineral servitude owned by another and burdened with such interest *when and if* production is obtained."). Indeed, although a mineral servitude owner can create a mineral royalty, *see* LA. REV. STAT. ANN. § 31:82, the converse is not true.

29. LA. REV. STAT. ANN. § 31:83.

consideration is subsection 5, which recognizes an important exception to the occurrence of confusion.[30] It provides:

> Art. 85. Extinction of mineral royalties
>
> A mineral royalty is extinguished by:
>
> * * *
>
> (5) extinction of the right of him who established the mineral royalty, except that the extinction of a mineral servitude by inheritance or by any act of the servitude owner does not extinguish a royalty burdening the servitude unless the royalty owner is a party to the act or otherwise consents expressly and in writing to become bound by it.[31]

Although each of the discrete circumstances listed in article 85 is both logical and consistent with the corresponding article relative to the mineral servitude,[32] article 85(5) merits particular commentary.

The exception provided in article 85(5) is designed to ensure that the holder of a royalty interest is not divested of its rights by certain actions over which the holder has no control. In particular, it assuages concerns that the mineral servitude owner might engage in a nefarious scheme in an attempt to purge the royalty owner of its rights, passive and inferior as they might be.

The comment to article 85 cautions that "[s]ome care should be taken in the reading and application of paragraph 5 of article 85."[33] The comment notes that the rule only applies if the mineral royalty is carved out of a mineral servitude and, hence, is dependent upon the continuation of the latter for its existence. Thus, as further explained in the comments to article 85:

> The exceptions in paragraph 5 are necessary to prohibit potential injustice arising from honest or conspiratorial acts of a party or by operation of law. For example, the owner of a mineral servitude who has created a mineral royalty should not be permitted by collusive action, or by arms' length dealing, to extinguish the

30. *Cf*. LA. CIV. CODE art. 765 (2018) ("A predial servitude is extinguished when the dominant and the servient estates are acquired in their entirety by the same person.").

31. LA. REV. STAT. ANN. § 31:85(5).

32. *Id*. § 31:27.

33. *Id*. § 31:85 cmt.

> royalty by a renunciation or remission of his servitude in favor of the landowner. Insertion of the exception in this regard does not inhibit the servitude owner from dealing with his interest as may be of greatest benefit to himself, but it protects the royalty owner appropriately. The other exception contemplates the possibility that a party may, for example, create a mineral servitude in favor of a child, who may in turn create a royalty. Death of the parent with resultant acquisition of the land by the child would extinguish the servitude by confusion. The royalty created by the child, however, should not be extinguished by operation of law in these circumstances.[34]

Thus, article 85(5) articulates that an "act of the servitude owner" that would otherwise result in the "extinction of a mineral servitude" will not have that effect "unless the royalty owner is a party to the act or otherwise consents expressly and in writing to become bound by it."[35]

An example that comes to mind is the execution by the mineral servitude owner of an instrument that renounces the servitude.[36] Although that would ordinarily bring the servitude to an end and, concomitantly, result in the extinction of the mineral royalty burdening the servitude, this result would not occur "unless the royalty owner is a party to the act or otherwise consents expressly and in writing to become bound by it." Any other rule would facilitate chicanery by permitting the grantor of the royalty interest to cause its premature termination with impunity. Such an action would be repugnant to notions of good faith owed by a contracting party[37] and a grantor's warranty of eviction.[38]

It should be reiterated that this exception is "applicable only if the royalty is carved out of a servitude interest and is not applicable when a servitude interest is merely burdened with a royalty that is not dependent on the servitude in terms of prescriptive life."[39] The Redactors of the Mineral Code were thoughtful and prudent in addressing the possibility

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34. *Id*.

35. *Id*. § 31:85(5).

36. *Id*. § 31:27(3). *Cf*. LA. CIV. CODE art. 771 (2018) ("A predial servitude is extinguished by an express and written renunciation by the owner of the dominant estate.").

37. *Cf*. LA. CIV. CODE art. 1759 ("Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.").

38. *Cf. id.* art. 2512 ("The warranty against eviction extends also to those things that proceed from the thing sold.").

39. *See* L. Linton Morgan, *The Impact of Louisiana Mineral Code on Mineral Servitudes and Mineral Royalties*, 22 ANN. INST. ON MIN. L. 1, 19 n.54 (1975).

that a party would use certain means to effectively "wash-out" the valuable rights of a mineral royalty owner.

C. Article 112[40]

The Louisiana Mineral Code also governs executive rights, and the owner of these rights must give consent before drilling operations may be conducted by the owner of the land or mineral servitude if undertaken other than pursuant to a mineral lease granted by the executive right owner. An executive right is defined in article 105 of the Mineral Code as "the exclusive right to grant mineral leases of specified land or mineral rights."[41] Being an "exclusive" right, no other person should have the ability either to grant a mineral lease on the "specified land or mineral rights" or to operate in its own right, as to do so would render meaningless the exclusivity of this mineral right.[42] An exception is recognized by article 112 of the Code as follows:

> Art. 112. Right of nonexecutive to operate
>
> When the executive right is separated from a mineral servitude or ownership of the land, the land or servitude owner has the right, with the consent of the owner of the executive right, to conduct drilling or mining operations on the land.[43]

In recognition of the fact that an executive right is the "exclusive right to grant mineral leases of specified land or mineral rights,"[44] the Mineral Code expressly states that the consent of the owner of the executive right is necessary in order for the owner of the land or of a mineral servitude to conduct drilling operations on the land in question.

Were the consent of the owner of the executive right not required under these circumstances, it would render the executive right somewhat illusory because the right to grant a mineral lease would be diminished if the owner of the land undertook, for his own account, the conduct of drilling operations. Certainly, the lessee under a mineral lease granted by the holder of an executive right would have something to say if the owner of the land or mineral servitude could operate with impunity on the leased

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40. Portions of the commentary on article 112 represent an adaptation of materials contained in § 7-14 of OTTINGER, MINERAL LEASE TREATISE, *supra* note 1.

41. LA. REV. STAT. ANN. § 31:105.

42. *Id*.

43. *Id*. § 31:112.

44. *Id*. § 31:105.

land in total disregard of the valid rights of the mineral lessee. The mechanism of consent guards against this contingency.

D. Article 146[45]

In the nascent stages of the oil and gas industry in Louisiana, courts were called upon to elucidate with respect to the legal nature of contracts for the exploration for oil, gas, or other minerals. In an early case, the Louisiana Supreme Court stated that "mineral leases will be construed as leases, and not sales, and that the law with reference to leases will be applied thereto in so far as they may be."[46] The judicial pronouncement led to numerous cases that presented the issue of the applicability to the mineral leases of legal features of a lease.

As early as 1940, the Louisiana Supreme Court recognized that "the mineral lessor is entitled to a lien, privilege and right of pledge upon the property placed on the leased premises by the lessee."[47] Hence, just as in the case of a lessor of a non-mineral lease governed by the Civil Code, a lessor under a mineral lease has a right of pledge to seize the lessee's property to enforce certain obligations of the lessee, principally the duty to pay royalty.[48]

Mineral Code article 146 continues this security device, as follows:

> Art. 146. Lessor's privilege
>
> The lessor of a mineral lease has, for the payment of his rent, and other obligations of the lease, a right of pledge on all equipment, machinery, and other property of the lessee on or attached to the property leased. The right also extends to property of others on or attached to the property leased by their express or implied consent in connection with or contemplation of operations on the lease or land unitized therewith.[49]

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45. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 12-15.

46. Spence v. Lucas, 70 So. 796, 798 (La. 1915).

47. Tyson v. Surf Oil Co., 196 So. 336, 342 (La. 1940).

48. "[R]oyalties paid to the lessor on production are rent. A mineral lessee is obligated to make timely payment of rent according to the terms of the contract or the custom of the mining industry in question if the contract is silent." LA. REV. STAT. ANN. § 31:123; *see also* Patrick S. Ottinger, *Calculating the Lessor's Royalty Payment: Much More than Mere Math*, 6 LSU J. ENERGY LAW & RESOURCES 1 (2018).

49. LA. REV. STAT. ANN. § 31:146.

The context in which consent is a feature of this article pertains to "property of others on or attached to the property leased." If a third party grants consent—either expressly or implicitly—that its property might be used on the leased premises, that property is subject to the risk that the lessor's privilege will attach to the movable property, provided that such property is envisioned to be used "in connection with or contemplation of operations on the lease or land unitized therewith." By consenting to the use of its property in this manner, the third person assumes the risk that the lessee will not pay royalties due to its lessor, thus giving rise to the possibility that the lessor will seize the third party's property as collateral security for money owed by the lessee.

The security afforded by article 146 of the Mineral Code can be of great comfort to a mineral lessor whose lessee has failed to comply with its obligations under the mineral lease. The article strikes a balance between the lessor and a third person whose property has been used on the leased land.

E. Article 147[50]

As a corollary to the foregoing, in a proper case, movable property made subject to the lessor's privilege remains so encumbered and is thus subject to seizure by the lessor even if it is removed from the leased premises without the consent of the lessor. That is, the burdened property may be pursued off of the leased premises, provided it is seized "within fifteen days after it has been removed by the lessee without the consent of the lessor."[51]

On the other hand, if the lessor consents to the removal of the property, it has necessarily excluded the property from the reach of the privilege that might otherwise apply. These principles are acknowledged in article 147 of the Mineral Code, reading, as follows:

> Art. 147. Right to seize property on premises or within fifteen days of removal
>
> The mineral lessor may seize the property subject to his privilege before the lessee removes it from the leased premises, or within fifteen days after it has been removed by the lessee without the consent of the lessor, if it continues to be the property of the lessee,

50. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 12-15.
51. LA. REV. STAT. ANN. § 31:147.

and can be identified.[52]

In *Vaught v. Ratliff*,[53] a case admittedly not concerned with the notion of consent, a lessor sought to seize certain movable property located on the leased premises to secure its claim for unpaid royalties. Asserting that he was the owner of the seized equipment, a third party owning no interest in the mineral lease intervened in the suit to seek the release of his property from the sequestration. The court stated that "[t]he issue presented here is whether there exists any remedy at law for the intervenor to recover his property seized to secure a lessor's privilege in the context of a mineral lease to which he was not a party."[54]

After reviewing the applicable provisions of the Louisiana Mineral Code— particularly including articles 146, 147, and 148[55]—the Louisiana Civil Code, and the Louisiana Code of Civil Procedure, the court concluded that "there is an absence of express law in the Mineral Code governing this particular situation."[56] The court then declined to resort to statutory provisions not contained in the Mineral Code,[57] saying, as follows:

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52. *Id*.

53. Vaught v. Ratliff, 509 So. 2d 647 (La. Ct. App. 3d Cir. 1987).

54. *Id*. at 648.

55. Article 148 of the Louisiana Mineral Code provides: "The mineral lessor may enforce his right of pledge in the same manner as the right of pledge accorded other lessors."

56. *Vaught*, 509 So. 2d at 650.

57. The court's declination to invoke and apply the procedural aspects of the Code of Civil Procedure seems insupportable in view of Mineral Code article 2 and of the actual language of article 148, *supra* note 55, which expressly states that the right of pledge contained in article 146 may be enforced "in the same manner as the right of pledge accorded other lessors." This textual referral to other relevant laws, without more, should have been ample authority for the court to invoke those laws. More contemporary decisions of the courts have properly recognized that resort to "other laws" is justified and appropriate only if the matter under consideration is not addressed by the Mineral Code. *See, e.g.*, Regions Bank v. Questar Expl. & Prod. Corp., 184 So. 3d 260, 265–66 (La Ct. App. 2d Cir.), *writ denied*, 206 So. 3d 882 (La. 2016) ("The general lease provision, article 2679 of the Civil Code enacted in 2005, and which provides that a maximum lease term is 99 years, cannot apply to mineral leases because mineral leases have their own maximum term as provided by the Mineral Code.") and Gloria's Ranch v. Tauren Expl., Inc., 252 So. 3d 431, 438 (La. 2018) ("First, on a legal basis, we find no authority for superseding the ownership principles set forth in the La. Mineral Code with those of the La. Civil Code."). In the interest of full disclosure, your author represented certain *amici curiae* in the *Gloria's Ranch* case.

> The absence of express statutory provisions in the Mineral Code for the protection of third parties tempts us to essay a judicial emendation under authority of LSA–C.C. art. 21, but the comparatively recent redaction and adoption of the Mineral Code suggests that the matter is more appropriate for legislative consideration.[58]

Although the court found it inappropriate to apply former article 2707 of the Louisiana Civil Code—which, at that time, provided a remedy for third persons affected by a seizure by a lessor—it nevertheless gave relief to the intervenor by finding that the seized property was exempt from seizure.[59] The court ultimately held that, "Based upon this finding and the requisite proof of ownership presented in the court below, the writ of sequestration should be ordered dissolved as to that property shown in the trial court to belong to the intervenor herein."[60]

Article 147 strikes a balance between the security rights of the lessor by allowing pursuit of the encumbered property within a reasonable period of time after it is removed from the leased premises.

F. Consent Among Owners in Indivision—Articles 164, 166, and 175[61]

1. Introduction

Three articles of the Louisiana Mineral Code address the circumstances under which operations may be conducted on co-owned land or mineral servitude without the necessity to secure the unanimous consent of all co-owners, and intervening articles involving the notion of consent will be examined thereafter. As will be seen, the articles, while addressing different factual circumstances, are quite similar in content and import and share in common two features of consent, namely: (1) identifying the threshold of consent that must be obtained in order to operate on the land in question; and (2) recognizing that costs of

58. *Vaught*, 509 So. 2d at 650.

59. *Id*. at 650–51.

60. *Id*. at 651.

61. Portions of the commentary on articles 164, 166, and 175 represent an adaptation of materials contained in Patrick S. Ottinger, *Oil in the Family—Obtaining the Requisite Consent to Conduct Operations on Co-Owned Land or Mineral Servitudes*, 73 LA. L. REV. 745 (2013) [hereinafter Ottinger, *Oil in the Family*]; *see also* C. ESTON SINGLETARY, LOUISIANA MINERAL LAW TREATISE, *Chapter 12, Co-ownership and Partition* § 1211 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012) [hereinafter SINGLETARY, MINERAL LAW TREATISE].

development and operations cannot be assessed against a party whose consent was not obtained. These common features will be considered hereafter.

In the interest of clarity, article 164, 166, and 175 are examined as a group, with differences being noted as necessary. The first of such articles addresses the creation of mineral servitude by a co-owner of land.

2. Article 164

Article 164 of the Louisiana Mineral Code pertains to the circumstances under which the owner of a mineral servitude acquired from less than all of the owners of the land may conduct operations. More typically, it is the lessee of such a mineral servitude who will undertake the conduct of operations, but such lessee acquires no greater rights than its lessor,[62] so the same threshold of consent must be obtained in order to do so. Article 164 reads:

> Art. 164. Creation of mineral servitude by co-owner of land
>
> A co-owner of land may create a mineral servitude out of his undivided interest in the land, and prescription commences from the date of its creation. One who acquires a mineral servitude from a co-owner of land may not exercise his right without the consent of co-owners owning at least an undivided seventy-five percent interest in the land, provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations, except out of his share of production.[63]

As noted above, article 164 is the first of the trilogy of articles that impose a requirement that the consent of a certain threshold of owners be obtained and that, with respect to all co-owners who have not granted their consent, an effort be made to contract with such non-consenting co-owners. Article 164 creates a template for the treatment of matters addressed in two other contexts, being articles 166 and 175.

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62. Case law and logic embrace the proposition that a party cannot grant, lease, or convey any greater rights than it holds or owns. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 2-09.

63. LA. REV. STAT. ANN. § 31:164 (2000) (Supp. 2019).

3. Article 166[64]

In contrast to the situation in which a passive right of mineral royalty is created by a co-owner of a superior interest (a matter regulated by article 165 of the Mineral Code), the creation of a mineral lease by a co-owner of land presents a significantly different set of considerations. These circumstances are regulated by article 166 of the Mineral Code:

> Art. 166. Granting of mineral lease by co-owner of land
>
> A co-owner of land may grant a valid mineral lease or a valid lease or permit for geological surveys, by means of a torsion balance, seismographic explosions, mechanical device, or any other method as to his undivided interest in the land but the lessee or permittee may not exercise his rights thereunder without consent of co-owners owning at least an undivided seventy-five percent interest in the land,[65] provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations or other costs, except out of his share of production.[66]

A co-owner of land can grant a mineral lease as to his interest, and it is a valid lease,[67] but operations cannot be undertaken on the co-owned land unless the strictures of the article are satisfied, which are matters addressed herein.[68]

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64. Portions of the commentary on article 166 represent an adaptation of materials contained in Ottinger, *Oil in the Family*, *supra* note 61, as well as of OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 3-42.

65. *See infra* Section I.F.5.a.

66. LA. REV. STAT. ANN. § 31:166. Inexplicably, the last sentence of article 166 differs slightly from the other two articles of our trilogy in that it makes reference to the non-liability of a non-consenting party "for the costs of development and operations *and other costs*." "Assuming that it was intentional (and even meaningful), it is unapparent why this article (addressing the granting of a mineral lease by a co-owner of land) would justify this different formulation." Ottinger, *Oil in the Family*, *supra* note 61, at 785.

67. *See infra* Section I.F.5.c

68. As a historical matter, the right of a co-owner of land to operate on the co-owned property was considered in a significant Louisiana Supreme Court decision, *Gulf Refining Co. of Louisiana v. Carroll*, 82 So. 277 (La. 1919), and

4. Article 175[69]

Similar to the instance where, as under article 166, a co-owner of land may grant a valid mineral lease, a co-owner of a mineral servitude must obtain consent of a requisite percentage of co-owners before it can exercise its rights to operate on the land burdened by the co-owned mineral servitude. This proposition is regulated by Mineral Code article 175.

As with the two articles previously considered, articles 164 and 166, and except as hereinafter provided, no exploration and production (E&P) operations may be conducted on land burdened by a distinct mineral servitude that is owned in indivision unless the requisite level of consent of co-owners of such servitude is obtained. There is an important difference, however, in the manner in which the level of consent is calculated.[70] Article 175 reads:

> Art. 175. Co-owner of mineral servitude may not operate independently
>
> A co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of co-owners owning at least an undivided seventy-five percent interest in the servitude,[71] provided that he has made every effort to contact such co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. . . . A co-owner of the servitude who does not consent to such operations has no liability for the costs of development and operations except out of his share of production.[72]

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was expounded upon in later decisions of the Louisiana Supreme Court. *See, e.g.*, North Central Texas Oil Co. v. Gulf Ref. Co. of La., 105 So. 411 (La. 1925); United Gas Pub. Serv. Co. v. Arkansas-Louisiana Pipe Line Co., 147 So. 66 (La. 1933); and Amerada Petroleum Corp. v. Reese, 196 So. 558 (La. 1940).

69. *See* SINGLETARY, MINERAL LAW TREATISE, *supra* note 61, § 1211.

70. *See* Ottinger, *Oil in the Family*, *supra* note 61, Part IX at 78–82.

71. *See infra* Section I.F.5.a.

72. LA. REV. STAT. ANN. § 31:175 (2000) (Supp. 2019).

5. Commentary on Common Features of Articles 164, 166, and 175

a. Consent Threshold

Each article authorizes the conduct of operations on the subject land or servitude only if the party proposing to conduct operations has secured a stated level of consent among relevant co-owners. When the Mineral Code was adopted, the consent of all co-owners was required for the conduct of operations. This was consistent with applicable law pertaining to co-ownership. However, in 1986, the Louisiana Legislature reduced the level of consent needed in order to operate to 90%, and it later reduced it to 80% in 1988.[73] With the adoption of Act No. 350 of the 2019 Regular Session of the Louisiana Legislature, effective August 1, 2019, the requisite level of consent was reduced to 75%.

b. Codal Proviso

Pursuant to Mineral Code article 164, the owner of a mineral servitude created by fewer than all of the co-owners of land must secure "the consent of co-owners owning at least an undivided seventy-five percent interest in the land" in order to operate on such land.[74] Similarly, under Mineral Code article 166, one who acquires a mineral lease from a co-owner of land may not exercise such right without the consent of co-owners of the land owning at least an undivided 75% interest "in the land."[75] Because one may not transfer greater rights than he has,[76] a lessee of a co-owner may not operate on the co-owned land unless and until the requisite consent is obtained.

Assuming that the requisite consent is obtained, the party desiring to operate still must demonstrate that he has made "every effort" to contact such yet-to-have-consented co-owners and, if contacted, has offered to contract with them on substantially the same basis that he has contracted with another co-owner. In other words, it is "consent plus."

As is often the case, the legislation raises many questions. For example, noting that article 166 requires that "every effort" be made to contact the other co-owners and that the adjective "reasonable" does not modify those words, it is uncertain as to what effort "to contact" will be

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73. *See* Ottinger, *Oil in the Family*, *supra* note 61, Part III at 761–64.

74. LA. REV. STAT. ANN. § 31:164 (2000) (Supp. 2019).

75. *Id*. at § 31:166.

76. For authority supporting the proposition that a party cannot grant, lease, or convey any greater rights than it holds or owns, see OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 2-09.

deemed to be sufficient or, more importantly, will be deemed to fall short of constituting "every effort."

Is the phrase, "every effort," intended to be read literally, or does it mean "every *reasonable* effort"? If a lessee cannot locate an owner using conventional methods, does the lessee have to advertise in a newspaper in an attempt to ascertain the absentee's whereabouts? What effort will be deemed to fail to constitute the making of "every effort" to contact these parties, with the result that operations cannot be lawfully conducted?

In the absence of unanimous consent, how does a title examiner issue an opinion that the unsuccessful efforts "to contact" the yet-to-have-consented co-owners are nevertheless sufficient to constitute "every effort" and, thus, that the proviso of article 166 has been satisfied such that E&P operations can be lawfully conducted, even without the consent of the parties who have not been contacted?[77]

Let's complicate this proposition. Those yet-to-have-consented co-owners who are contacted must be "offered [the opportunity] to contract . . . on substantially the same basis that [the party desiring to operate] has contracted with another co-owner."[78] Questions are presented by this requirement, including the following: Does the proviso essentially impose a statutory "Most Favored Nations Clause"? To whose "other contract," or "basis [of terms]," is this to be compared? What, for these purposes, does "another co-owner" mean?

What if the lessee has reached five different deals with five distinct co-owners—different bonus, rental, royalty, primary term, "Pugh Clause" term, other specific provisions, et cetera? What does "substantially the same basis" mean? Does the operator discharge its duty under the proviso by merely offering "to contract," but only on the terms most favorable to it? Can the co-owner so contacted insist that it be offered the opportunity to contract on the terms that are most favorable to it, failing which, the proviso has not been met?

Is the implication that, unless the lessee has tried to contact and contract with all co-owners, his operations under lease or leases from, say, 95% of the co-owners could be opposed by the non-contracting parties? What standard of proof will be required to demonstrate that the lessee has complied with the proviso or that he has made "every effort" to do so? Should all offers to lease be in writing?

In view of these unanswered issues, it is appropriate to again wonder how a title examiner can approve title for drilling purposes under these circumstances.

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77. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 1-26(b).

78. LA. REV. STAT. ANN. §§ 31:164, 31:166, 31:175.

c. Worth of a Mineral Right to Which Consent to Operate Not Granted

One final observation is appropriate with respect to the consequences arising out of a failure or inability to obtain the requisite consent in the circumstances addressed by two of the three articles considered thus far—articles 164 and 166.[79] Despite the language in the early cases that a mineral lease granted by one co-owner is "null in so far as the co-owner is concerned,"[80] the lease is still valid between the lessor and the lessee.[81] Actually, this is not merely a matter of conjecture or inference but is explicitly recognized in the text of article 166, which states that a "co-owner of land may grant a *valid* mineral lease . . . as to his undivided interest in the land but the lessee . . . may not exercise his rights thereunder without consent of co-owners owning at least an undivided seventy-five percent interest in the land."[82]

A similar observation is drawn from article 164, under which, by stating that a "co-owner of land may create a mineral servitude out of his undivided interest in the land" and that "prescription commences from the date of its creation,"[83] one must conclude that the servitude is valid and effective—inasmuch as prescription has begun to accrue—but simply cannot be used unless and until the requisite consent is acquired and the codal proviso is met.

Hence, the failure or inability to obtain the requisite consent does not render the mineral right invalid or without any value whatsoever. Rather, it simply means that no operations may be conducted on the surface of the land pursuant to that mineral right.

If the mineral servitude owner cannot operate on the land because the owner is unable to obtain the requisite consent as either article 164 or 175 requires, or if the owner of a mineral lease cannot operate on the land because the owner is unable to obtain the requisite consent as article 166 envisions, is there any value to the mineral right which it holds? Yes. Even though the owner of such a mineral right is not able to conduct drilling operations on the surface of the land due to the absence of the needed consent, it is still a valid mineral servitude or mineral lease. Thus, if the land in question is unitized with a well drilled on another tract in the unit, then the mineral right is valid and the owner thereof is entitled to

79. *See* Ottinger, *Oil in the Family*, *supra* note 61, Part XIII.

80. Gulf Ref. Co. of La. v. Carroll, 82 So. 277, 279 (La. 1919).

81. "By all this is not meant that the lease is not valid as between the lessor and the lessee, . . ." *Id*.

82. LA. REV. STAT. ANN. § 31:166 (emphasis added).

83. *Id.* § 31:164.

participate in production to the extent provided by law. Clearly, participation in a producing unit where the unit well is situated on another tract does not violate the prohibition of the conduction of operations on the co-owned tract of land.

On balance, one concludes that a mineral lease may be validly granted—and, thus, may represent a valuable asset to its holder, such as by being included in a unit in which operations are lawfully undertaken on another unitized tract—and that such conclusion is not diminished by the fact that the lessee under a mineral lease to which operational consent of the requisite number of owners may not have been obtained.

d. Limited Responsibility of Non-Consenting Co-Owner for Costs

We next examine the notion that, without having granted consent for the conduct of operations, a co-owner is not personally responsible for costs incurred by the party who conducts such operations.[84] Articles 164, 166, and 175 all contain a sentence invoking the established principle that a party not granting consent "has no liability for the costs of development and operations, except out of his share of production."[85] This statement is in recognition of the well-established tenet of Louisiana law, based upon principles of equity, including unjust enrichment, that the operator has a paramount right to be reimbursed for the share of costs allocable to a non-consenting owner before the latter may receive revenue from the well.[86]

Hunter Co., Inc. v. McHugh[87] is a case in which the constitutionality of the Conservation Act was challenged. In that case, the Louisiana Supreme Court addressed the plaintiff's contention that the Conservation Act[88] was invalid because, among other things, it made "no provision . . . for collecting or enforcing" the operator's right of reimbursement of drilling costs.[89] The Supreme Court rejected this contention by noting that:

> The answer to this [contention] of course is that the [operator] has

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84. The other aspect of consent is discussed in the commentary pertinent to article 166, changing only in particulars relative to the specific context involved in each of the three codal provisions.

85. LA. REV. STAT. ANN. §§ 31:164, 31:166, 31:175.

86. *See* Patrick S. Ottinger, *After the Lessee Walks Away—The Rights and Obligations of the Unleased Mineral Owner in a Producing Unit*, 55 ANN. INST. ON MIN. L. 59 (2008).

87. 11 So. 2d 495 (La. 1943).

88. Act No. 157, 1940 Acts 610 (codified at LA. REV. STAT. ANN. § 30:1, *et seq*.).

89. 11 So. 2d at 509.

> had and will have possession of all of the proceeds from the production of the well and may retain all of the proceeds until the drilling of the well and putting it on production is entirely paid for.[90]

The jurisprudence is replete with cases in which this proposition is developed.

In *Huckabay v. The Texas Co.*,[91] the defendant drilled a well pursuant to a mineral lease granted by the owners of a mineral servitude in and to an undivided seven-eighths interest in the lands. The plaintiffs owned the lands and the rights to the remaining one-eighth interest in the minerals. Plaintiffs asserted that the defendant "was in bad faith in entering on the land and drilling the well."[92] Thus, the plaintiffs argued that they were "entitled to participate, according to their ownership, in the production without being responsible for their share of the expenses."[93]

The Louisiana Supreme Court rejected this contention, noting that:

> [O]n several occasions this Court has applied the equitable rule that where one co-owner (or co-lessee) has explored and developed a field without the concurrence or assistance of the other, the former is bound to account to that other for his proportionate share of the proceeds less a proportionate share of the expenses.[94]

Additionally, in *Arkansas Fuel Oil Corp. v. Weber*,[95] the Louisiana Second Circuit Court of Appeal relied on *Huckabay* for the proposition that, "while the right of an owner to refrain from exercising his right of ownership is absolute, he is nevertheless, precluded from enjoyment of profits without participation in the expenses incurred in the production of such profits."[96]

Furthermore, in *General Gas Corp. v. Continental Oil Co.*,[97] the First Circuit Court of Appeal noted that, while a non-consenting party has rights of ownership with respect to a share of production obtained by the efforts

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90. *Id*.
91. 78 So. 2d 829 (La. 1955).
92. *Id*. at 830.
93. *Id*.
94. *Id*. at 831.
95. 149 So. 2d 101 (La. Ct. App. 2d Cir. 1963), *writ denied*, 151 So. 2d 493 (La. 1963).
96. *Id*. at 108.
97. 230 So. 2d 906 (La. Ct. App. 1st Cir. 1970).

of others, there is a "correlative obligation [on the part of the non-consenting owner] for a like percentage of drilling and operating costs."[98]

In *Willis v. International Oil and Gas Corp.*,[99] the Louisiana Second Circuit Court of Appeal reviewed the Louisiana jurisprudence on the right of the operator to be reimbursed out of production and concluded:

> In summary, whether one is a co-owner who has not concurred or assisted in the exploration and development of the property, or is the owner of a separately owned tract of land embraced within a drilling unit and has elected not to participate in the risk and expense of the unit well, there is no entitlement to share in the proceeds from production until the cost of drilling and operating the well is paid for.[100]

Moreover, in *Davis Oil Co. v. Steamboat Petroleum Corp.*,[101] the Louisiana Supreme Court noted:

> A non-operating owner of a mineral interest, who does not consent to operations within a compulsory drilling unit by an operating owner, has no liability for the costs of development and operations except out of his share of production.[102]

This body of jurisprudence finds conceptual support in the provisions of the Civil Code[103] and is encapsulated in the last sentence of the trilogy of articles, reading essentially—but not in every instance precisely—as follows:

> A co-owner of the land who does not consent to the exercise of such rights has no liability for the costs of development and operations or other costs, except out of his share of production.[104]

In summary, an operator who has met the applicable consent threshold necessary to conduct operations may do so, notwithstanding the fact that it has not secured the consent of all co-owners, but is relegated to

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98. *Id*. at 910.
99. 541 So. 2d 332 (La. Ct. App. 2d Cir. 1989).
100. *Id*. at 336.
101. 583 So. 2d 1139 (La. 1991).
102. *Id*. at 1141.
103. LA. CIV. CODE art. 488 (2018) ("Products derived from a thing as a result of diminution of its substance belong to the owner of that thing. When they are reclaimed by the owner, a possessor in good faith has the right to reimbursement of his expenses. A possessor in bad faith does not have this right.").
104. LA. REV. STAT. ANN § 31:166 (2000) (Supp. 2019).

recovering costs allocable to a party who has not consented, only out of production, if any, attributable to that non-consenting interest. If the well is a "dry hole," or fails to achieve "pay-out," the operator has no personal claim against the non-consenting party for any deficiency or unrecouped costs. The cases are legion in support of the proposition that one who has not consented to an operation is only responsible for its share of costs out of production.[105]

G. Articles 176 and 177

Article 176 of the Louisiana Mineral Code provides an exception to the article 175 requirement that the requisite level of consent must be obtained before E&P operations can be conducted under a co-owned mineral servitude. That article reads:

> *1. Codal Articles*
>
> Art. 176. Co-owner of mineral servitude may act to prevent waste or destruction or extinction of servitude
>
> A co-owner of a mineral servitude may act to prevent waste or the destruction or extinction of the servitude, but he cannot impose upon his co-owner liability for any costs of development or operation or other costs except out of production. He may lease or otherwise contract regarding the full ownership of the servitude but must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership.[106]
>
> Art. 177. Co-owner of mineral lease may not operate independently except to prevent waste, destruction, or termination
>
> A co-owner of the lessee's interest in a mineral lease may not independently conduct operations or, except as provided in this article and Article 171, deal with the interest without the consent of his co-owner. He may act to prevent waste, destruction, or termination of the lease and to protect the interest of all, but cannot impose upon his co-owner liability for any costs or expenses

105. *See* cases and codal authority contained in Ottinger, *supra* note 86, at Section 3.01.

106. LA. REV. STAT. ANN. § 31:176; *see also* SINGLETARY, MINERAL LAW TREATISE, *supra* note 61, § 1211.

> except out of production. In so acting he must act in good faith and must deal with the interest of the remaining owner or owners in the manner of a reasonably prudent lessee whose interest is not subject to co-ownership.[107]

2. An Exception to the Required Level of Consent

The language in these two related articles—"act to prevent waste"—refers to the possibility that drainage is occurring by reason of the presence of a "lease basis" well on an adjacent or nearby tract of land,[108] whereby a neighbor exercises its right under the "rule of capture"[109] by draining minerals from under the servitude tract.

The Louisiana Supreme Court took up the issue of the right of a co-owner to operate to prevent waste in *United Gas Public Service Co. v. Arkansas-Louisiana Pipe Line Co*.[110] In that case, the defendant acquired a mineral lease from F.E. Gloyd and began drilling operations. Subsequently, the plaintiff acquired a seven-fortieths interest in the same property and filed suit to enjoin the defendant from continuing the drilling operations. The trial court refused to issue the injunction, and the plaintiff appealed.

On original hearing, the Louisiana Supreme Court relied on the Louisiana jurisprudence and civil law doctrine that, without the other co-owner's consent, a co-owner may "oppose any attempt by his co-owner, or by lessee of his co-owner, to exploit the common property for oil or gas (or other minerals), a doctrine 'as old as the Roman Law.'"[111] Thus, the Court originally held that an injunction was the proper remedy

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107. LA. REV. STAT. ANN. § 31:177.

108. "The withdrawal of gas from the lands not only deteriorated them, but was a waste of them as the term 'waste' was meant in the act of mortgage." Fed. Land Bank of New Orleans v. Mulhern, 157 So. 370, 373 (La. 1934).

109. The "rule of capture" is codified by three articles of the Louisiana Mineral Code. *See* LA. REV. STAT. ANN. § 31:6 ("The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership."); *id.* § 31:8 ("A landowner . . . may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another."); *id.* § 31:14 ("A landowner has no right against another who causes drainage of liquid or gaseous minerals from beneath his property if the drainage results from drilling or mining operations on other lands.").

110. 147 So. 66 (La. 1932).

111. *Id*. at 67.

in that case and that the defendant's course of action was to institute a partition proceeding.

On rehearing, the Court found that granting an injunction might cause irreparable damage to the defendant and, at the same time, prevent the use of the property for gas-drilling operations. The Court distinguished this case from the important case of *Gulf Refining Co. of Louisiana v. Carroll*[112] by stating that it was not shown "that the land involved was proven oil or gas land nor that it was being drained and destroyed by adjacent wells," and, further, that "the titles of the landowners" were disputed.[113] The Court observed that, as a co-owner, the plaintiff would not be damaged by defendant's drilling operations if the defendant did not find gas. On the other hand, if the defendant did find gas, the plaintiff would be compensated financially for the value of the gas. Consequently, the Court held that a co-owner could not prevent drilling operations on the property owned in indivision and refused to issue the injunction. The co-owner could recover any damages from the drilling operations by receiving his share of the revenues from gas produced on the property.

The language in article 176—"destruction or extinction of the servitude"—alludes to the potential loss of the mineral servitude by the accrual of the prescription of nonuse.[114] What is not clear is how a court would view the earliest date prior to the accrual of prescription that would, in the absence of operations, give rise to the possible "destruction or extinction of the servitude" such that a co-owner of the servitude may take action to preserve the servitude under authority of article 176. A lessee under a mineral lease granted pursuant to this article would be vitally interested in knowing that the lease has not been granted too soon by a co-owner lacking the requisite level of consent, as the validity of such a lease is tethered to a showing that it is granted to avoid "the destruction or extinction of the servitude."

Although article 176 does not explicitly so state, these exceptions are seemingly only necessary in the absence of compulsory unitization affecting or including the servitude tract or a portion thereof. To the extent that a compulsory unit includes all or a portion of the servitude tract, there is no "waste" because there is no drainage of the servitude as such tract would participate in unit production.[115] By the same token, unit operations

112. Gulf Refining Co. of Louisiana v. Carroll, 82 So. 277 (La. 1919).

113. *United Gas*, 147 So. at 69.

114. "A mineral servitude is extinguished by . . . prescription resulting from nonuse for ten years." LA. REV. STAT. ANN. § 31:27(1). *See* OTTINGER, MINERAL LAW TREATISE, *supra* note 14, § 408.

115. "A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well. This unit shall constitute

or production would maintain the mineral servitude in force and effect to the extent that the servitude tract is in the unit.[116]

In those instances when the law dispenses with the need to obtain the requisite level of consent to conduct operations in order prevent "waste" or to avoid the "destruction or extinction of the servitude," the co-owner desiring to operate has the power to bind the non-acting co-owners to a mineral lease that the acting party chooses to grant, and such lease would validly cover "the full ownership of the servitude."[117] The instruction that the co-owner desiring to operate "must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership" is concordant with the similar principle as in a mineral lease granted by the owner of an executive interest.[118]

Although the Louisiana Mineral Code fails to explain the rights of a non-acting co-owner who is dissatisfied with the lease's terms, a court would apply by analogy the standards of articles 109 and 110[119] of the Louisiana Mineral Code as the most logical controlling principles. The rule announced by the latter article is of great importance—and significant comfort—to the lessee who is willing to incur the significant costs to drill the well. A violation of the standard of conduct, while giving rise to a

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a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities." LA. REV. STAT. ANN. § 30:9(B) (2007).

116. "It is now well established in the jurisprudence of this court that where there is a forced unitization, on order of the Commissioner of Conservation, commercial production from any part of the unit interrupts the running of prescription as to all mineral servitudes within the unit." White v. Frank B. Treat & Son Inc., 89 So. 2d 883, 884 (La. 1956); *see also* LA. REV. STAT. ANN. § 31:37 (2000) (Supp. 2019) ("Production from a conventional or compulsory unit embracing all or part of the tract burdened by a mineral servitude interrupts prescription, but if the unit well is on land other than that burdened by the servitude, the interruption extends only to that portion of the servitude tract included in the unit.").

117. LA. REV. STAT. ANN. § 31:176.

118. "The owner of an executive interest is not obligated to grant a mineral lease, but in doing so, he must act in good faith and in the same manner as a reasonably prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest." LA. REV. STAT. ANN. § 31:109; *see also* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 7-11.

119. LA. REV. STAT. ANN. § 31:110 ("A mineral lease granted in violation of the standard of conduct required by Article 109 is not invalid for that reason, but the owner of a nonexecutive interest may recover any damages sustained by him by a personal action against the owner of the executive right. The action prescribes one year from the date on which the lease is filed for registry."); *see also* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 7-12.

personal action by the non-consenting co-owner against the acting co-owner, would not invalidate the mineral lease.

Also unanswered by article 176 is the treatment to be given to a mineral lease granted to a different lessee by one or more co-owners *after* another co-owner has granted a mineral lease to another lessee pursuant to this article, which purports to cover and affect "the full ownership of the servitude." Does the "first come, first served" rule operate to deny legal efficacy to that second lease? Does that subsequent lease essentially become a "top lease"[120] with regard to the mineral lease granted pursuant to article 176, at least with respect to the interest of the lessor signatory to such subsequent lease?

Although not explicitly so stated, the placement of this limited exception immediately following article 175—coupled with the fact that logic would not compel a different conclusion—indicates that the limited exception is not available to one whose servitude is addressed by article 164.

The mineral servitude, which is treated by article 175 because it is a discrete co-owned mineral servitude, might also be subject to article 164 if all co-owners of the land did not create it in the first instance. Consequently, if a co-owner of the land created the mineral servitude in question, article 164 necessarily applies and requires the "consent of co-owners owning at least an undivided seventy-five percent interest in the land" so that operations might be conducted on the land.

Even having obtained the "consent of co-owners owning at least an undivided seventy-five percent interest in the land," if that discrete mineral servitude is itself co-owned, or owned in indivision, article 175 also applies and requires the "consent of co-owners owning at least an undivided seventy-five percent interest in the servitude" so that operations might be conducted on the land.[121] Thus, under these unique circumstances, two levels of consent must be obtained from two different categories of persons in order to operate on a co-owned servitude obtained from a co-owner of land.

John M. McCollam, a respected commentator, explained the import of Mineral Code article 177, noting:

> [U]nder Article 177 of the new code a co-owner of the lessee's interest in a mineral lease may not independently conduct operations on the leases (sic) premises without the consent of his

120. A "top lease" is a mineral lease that takes effect upon the expiration of an existing lease. *See* Scoggin v. Bagley, 368 So. 2d 763, 766 (La. Ct. App. 2d Cir. 1979); OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 6-02.

121. *See* Ottinger, *Oil in the Family*, *supra* note 61, Section VI.D at 769.

> co-owners unless such action is necessary to prevent waste, destruction or termination of the lease. This is the same rule which is applicable to co-owners of land. Under this article if a co-owner elects to act to preserve the lease or prevent waste or destruction he must do so at his own risk and expense and cannot recover his co-owner's share of such cost except out of production. The standard for determining when this independent right to act may become operative is that discussed and applied in *United Gas Public Service Co. v. Arkansas-Louisiana Pipeline Co.*[122]

Concerning the *United Gas* case previously discussed and cited in the above passage, commentators have cautioned that the "case should not be viewed as undercutting the validity of the rule that unanimous consent is required for mineral development (now [75%, at that time 80%] consent under the Mineral Code)," noting that the Supreme Court "placed great emphasis on the particular factual circumstances of the case, stressing that the property had no real value for farming purposes, had considerable value for mineral purposes, and was in the process of being drained by the plaintiff from his adjoining lands."[123]

An understanding of article 177 begins with the previously noted observation that, unless modified by agreement, the administration and management of a thing owned in indivision requires the concurrence of all co-owners.[124] These general principles are applicable unless modified by agreement of the co-owners. As is customary, co-owners of mineral leases often enter into an "operating agreement" that provides for the exploration, development, operation, or production of jointly owned mineral leases. The notion that, in the absence of a contrary agreement, unanimity among all co-owners of a mineral lease is required before operations may be conducted is reinforced when one contrasts article 177 with article 175 of the Louisiana Mineral Code, which, as noted above, allows a co-owner of a mineral servitude to operate if it has obtained the consent of not less than 75% of the co-owners of such servitude.[125]

As will be seen, the "agreement of all the co-owners" is typically granted and manifested by an operating agreement. By definition, an operating agreement typically exists, if at all, only in the circumstances

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122. *See* John M. McCollam, *Impact of Louisiana Mineral Code on Oil, Gas and Mineral Leases*, 22 ANN. INST. ON MIN. L. 37, 104 (1975).

123. Symeon C. Symeonides & Nicole Duarte Martin, *The New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 129 n.320 (1993).

124. "The use and management of the thing held in indivision is determined by agreement of all the co-owners." LA. CIV. CODE art. 801 (2018).

125. LA. REV. STAT. ANN. § 31:175 (2000) (Supp. 2019).

where two or more persons or companies own one or more mineral leases in indivision.[126] Conversely, there is obviously no need for an operating agreement to exist if a mineral lease is owned by one single person or company. One might best appreciate the import of an operating agreement if one understands what rules apply if no operating agreement exists among co-owners of a mineral lease.[127] In particular:

> Typically the [operating] agreement provides for the development of the premises by one of the parties for the joint account. The parties to the agreement share in the expenses of the operations and in the proceeds of development, but the agreement normally is not intended to affect the ownership of the minerals or the rights to produce, in which respects, among others, the joint operating agreement is to be distinguished from a unitization agreement and from a mining partnership.[128]

As characterized by a Texas court,[129] the operating agreement is not "an ordinary contract"; instead, the court described the operating agreement as follows:

> Joint Operating Agreements, standardized forms developed over years by the industry to govern ventures in the development of oil and gas properties, are simply not everyday fixtures of life. They govern operations involving immense financial risk and reward; the parties to J.O.A. are experienced and sophisticated and

126. It should be noted that an operating agreement might also exist where parties enter into a contract for the joint operation of separately or distinctly owned mineral leases.

127. The American Association of Professional Landmen (AAPL) has played an integral role in the development and refinement of operating agreements through the publication and promotion of its Model Form. The most widely used form of operating agreement is the AAPL Form 610—Model Form Operating Agreement published by the AAPL. First introduced in 1956 at its Annual Meeting in Denver, Colorado, revised forms were issued by the AAPL in 1977, 1982, 1989, and 2015.

128. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS: MANUAL OF OIL AND GAS TERMS (17th ed. 2018). As stated by other respected commentators, an operating agreement is a contract typical to the oil and gas industry whose function is to designate an "operator, describe the scope of the operator's authority, provide for the allocation of costs and production among the parties to the agreement, and provide for recourse among the parties if one or more default in their obligations." 3 ERNEST E. SMITH & JACQUELINE L. WEAVER, TEXAS LAW OF OIL AND GAS § 17.3, at 17–7 (2d ed. 2006).

129. Hill v. Heritage Res., Inc., 964 S.W. 2d 89, 112 (Tex. App. 1997).

> generally have balanced bargaining positions. These are agreements which involve liabilities and obligations unique to the legal and technical peculiarities of the oil and gas industry.[130]

Further, the Louisiana Supreme Court described an operating agreement—often called a joint operating agreement or "JOA"—as "a contractual agreement between interested parties for the operation of a tract or leasehold for oil, gas, and other minerals."[131] The customary form of operating agreement contains myriad provisions that regulate an array of activities that arise in reference to joint operations. The principal clause that would pertain to the consent requirement of article 177 would be the "Subsequent Operations Clause."[132]

Although an operating agreement is the most common means of regulating or securing consent among co-owners of mineral leases, the execution of an operating agreement is not required. Consent can be found in other ways than through the execution of an operating agreement. For example, in *Double-Eight Oil and Gas L.L.C. v. Caruthers Producing Co., Inc.*,[133] a non-operator contested the right of the operator to bill it "for expenses arising from the squeezes (sic) and related operations which were incurred while CPC was the operator of the wells."[134]

The Louisiana Second Circuit Court of Appeal disagreed with the contention of the non-operator, concluding that the trial court was not in error in finding that the non-operator had consented to the operation as anticipated by article 177 of the Mineral Code. The Second Circuit Court of Appeal noted that "there is no requirement that co-owners of a mineral lease have a written operating agreement, and the parties "conducted business verbally."[135] The court concluded: "In order to impose preproduction liability on a co-owner, the operator must have the consent of the lease co-owners to the operations. There was evidence, deemed credible by the trier of fact, that the plaintiffs were aware of and consented to CPC's activities."[136]

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130. *Id.*

131. Clovelly Oil Co. v. Midstates Petroleum Co., 112 So. 3d 187, 190 (La. 2013). In the interest of full disclosure, your author represented certain *amici curiae* in this suit.

132. *See* Patrick S. Ottinger, *Be Careful What You Ask For: Subsequent Operations Under the Model Form Operating Agreement*, 63 ANN. INST. ON OIL & GAS L. 281 (2012).

133. 942 So. 2d 1279 (La. Ct. App. 2d Cir. 2006).

134. *Id*. at 1285.

135. *Id*.

136. *Id*.

H. Article 165

As noted above in the commentary pertinent to article 85(5) of the Mineral Code,[137] a mineral royalty is a passive right that entitles its owner to share in production brought about by the actions of another. Because of its inferior nature, the right merely represents an entitlement to a share of production, and a co-owner of land does not need the consent of another co-owner to create a mineral royalty, as indicated by article 165:

> Art. 165. Creation of mineral royalty by co-owner of land
>
> A co-owner of land may create a mineral royalty out of his undivided interest in the land, and the prescription of nonuse commences from the date of its creation. The consent of the co-owner of the party creating the royalty right is not necessary to entitle the royalty owner to receive his proportionate part of production.[138]

The comment to this article explains its *raison d'être*, particularly as it pertains to the dispensation with any requirement of consent to the creation by a co-owner of land of a mineral royalty affecting only that co-owner's interest in the land. The comment reads, as follows:

> Article 165 is contrary to that applicable to mineral servitudes under Article 164 in that a co-owner of land, though he may validly create a mineral servitude in proportion to his ownership rights in the land, cannot confer upon the grantee of such a mineral servitude the power to exercise his right except by consent of the other co-owners of the land subject to the servitude. The rationale for that rule is, of course, that a new utilization of land which is the subject of co-ownership requires the consent of the co-owners, and no single co-owner can confer the right to utilize the land without the consent of his co-owner or co-owners unless it be for the purpose of preventing waste or destruction of the co-owned property. However, since the creation of a mineral royalty does not confer an active use right in the same sense that a mineral servitude confers such rights, there is no reason to require the consent of co-owners to the creation of such an interest or to the participation by the owner of such an interest in production. Permitting such sales and actual participation in production

137. *See* Section I.B.
138. LA. REV. STAT. ANN. § 31:165 (2000) (Supp. 2019).

> without the consent of all co-owners does no violence to the basic rule requiring unanimous consent; for there to be production there will have had to be consent to the exercise of a servitude or the granting of a lease.[139]

It is cogent that the consent of other co-owners is unnecessary because the creation of a mineral royalty does nothing other than constitute an alienation or fractionalization of the right of the granting party to share in production. Self-evidently, no harm comes to other co-owners by the creation by one co-owner of the passive right of royalty.

I. Article 170[140]

"The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease,"[141] and, as such, they "are susceptible of ownership in indivision."[142] Typically, in the absence of contract, a co-owner of a thing held in indivision must obtain consent from its other co-owners to take certain actions.[143] No consent is needed, however, in the case where a co-owner of a mineral servitude deems it appropriate to create a mineral royalty burdening only its interest. The Mineral Code establishes this principle in article 170, which provides:

> Art. 170. Right of co-owner of mineral servitude to create mineral royalties
>
> A co-owner of a mineral servitude may create a mineral royalty out of his undivided interest in the servitude and prescription of nonuse commences from the date of its creation. The consent of the co-owner of the party creating the royalty is not necessary to entitle the royalty owner to receive his proportionate part of production.[144]

For the same reasons that allow a co-owner of land to create a mineral

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139. *Id*., cmt.

140. *See* SINGLETARY, MINERAL LAW TREATISE, *supra* note 61, § 1207.

141. LA. REV. STAT. ANN. § 31:16.

142. *Id.* § 31:168.

143. "The use and management of the thing held in indivision is determined by agreement of all the co-owners." LA. CIV. CODE art. 801 (2018).

144. LA. REV. STAT. ANN. § 31:170. This is consistent with article 805 of the Louisiana Civil Code, which recognizes that a "co-owner may freely lease, alienate, or encumber his share of the thing held in indivision."

royalty out of its individual interest,[145] without the need to secure the consent of its co-owners, the co-owner of a mineral servitude has the same prerogative, unburdened with any need to obtain consent from other co-owners of the servitude.[146] Thus, the comment to article 170 notes:

> The right of the owner of a mineral servitude to create a mineral royalty is recognized by Article 82. The rationale for permitting the co-owner of a mineral servitude to create a royalty is similar though not identical to that for permitting co-owners of land to create royalties. . . . In the case of mineral servitudes subject to co-ownership, however, there is additional reason to permit creation of royalties. Co-owners of mineral servitudes are given independent rights of operation under Article 175. Thus, unanimous consent to utilize the servitude is not required as in the case of consent by co-owners of land to the exercise of a servitude or mineral lease. . . . In light of this fact, there is all the more reason to permit the co-owner of a mineral servitude to convey a passive right to share in production.[147]

Because a mineral royalty is simply an alienation or redistribution of a portion of the revenue to which the creator is entitled, it is of no concern to another co-owner that its co-proprietor chooses to diminish its right to all of the revenue to which it is entitled.

J. Article 171[148]

Concordant with the situation in which a co-owner of land or of a mineral servitude creates a mineral royalty interest, the co-owner of the working interest in a mineral lease can allocate to another person a portion of its revenue entitlement by creating certain "dependent rights," such as an overriding royalty interest. Thus, article 171 states:

> Art. 171. Right of co-owner of mineral lease to create dependent rights

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145. *See* Section I.G.

146. *See* discussion of article 165, *supra* Section I.H.

147. LA. REV. STAT. ANN. § 31:170 cmt.

148. Portions of the commentary on article 171 represent an adaptation of materials contained in OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 10-10; *see also* SINGLETARY, MINERAL LAW TREATISE, *supra* note 61, § 1207.

> A co-owner of the lessee's interest in a mineral lease may create a dependent right such as an overriding royalty, production payment, net profits interest, or other non-operating interest out of his undivided interest without the consent of his co-owner. He may also transfer all or part of his undivided interest.[149]

The most prevalent form of a "dependent right" is the overriding royalty interest. The overriding royalty interest entitles its owner to participate in production from or attributable to a mineral lease without the associated payment of costs or expenses.[150] In the industry, an overriding royalty interest is called an "override" or an "ORRI."[151] The Louisiana Second Circuit Court of Appeal has stated that: "An overriding royalty under an oil and gas lease is an incorporeal immovable."[152]

The comment to article 171 expounds on the import of the article:

> Article 171 permits a co-owner of a mineral lease to create nonoperating interests such as those listed to the extent of his ownership in the lease without the consent of the remaining co-owner or co-owners. In so doing, it reflects the accepted industry practice. Nonoperating interests of this kind are passive income interests, and allowing their creation does not conflict with the principle stated in Article 177, which prohibits one co-owner of a lease from operating without consent of the other. The thrust of Article 177 is that management decisions concerning operations must be made by all of the co-owners. However, insofar as one co-owner has a right to share in production, there is no reason why he should be prohibited from dealing with the income stream from his undivided interest as he sees fit. It is true that an argument might be made that permitting a co-owner to alienate portions of the income stream flowing from the lease, even though limited to his own fractional interest, permits him to lessen the value of the

149. LA. REV. STAT. ANN. § 31:171. This is consistent with article 805 of the Louisiana Civil Code, which recognizes that a "co-owner may freely lease, alienate, or encumber his share of the thing held in indivision."

150. Although an overriding royalty interest is immune from responsibility for drilling, testing, completing, equipping, and operating expenses, it would be liable for "post-production costs" unless excused by contract. *See* Patrick S. Ottinger, *A Funny Thing Happened at the Wellhead: "Post-production Costs" and Responsibility Therefor*, 8 LSU J. ENERGY LAW & RESOURCES 1 (2019), Section III.A.1 at 32–33.

151. For a comprehensive examination of the ORRI, see Randall S. Davidson, *The Overriding Royalty*, 27 ANN. INST. ON MIN. LAW 38 (1980).

152. Porter v. Johnson, 408 So. 2d 961, 965 (La. Ct. App. 2d Cir. 1981).

> co-owned property. However, there has never been any question of this nature raised by those commonly dealing with mineral leases, and it is clear that to prohibit continuation of this custom of dealing would have caused great difficulty.
>
> Insofar as Article 171 permits transfers of all or part of a co-owner's undivided interest, it also reflects established law and practice. See Article 127.
>
> Insofar as royalties are concerned, there are no management or use problems among co-owners of a royalty. In final form the owner of a royalty shares in the income stream from gross production. Partition in effect results from sharing of income among co-owners of the right. If further division is desired, the co-owner of a royalty may dispose of all or any portion of his interest freely and without consent of his co-owners.[153]

Article 171 affirms the proposition that, by reason of its passive nature, and in view of the fact that it merely represents a right to share in production, a mineral royalty may be established by the "co-owner of the lessee's interest in a mineral lease," and the creation of such mineral right, burdening the distinct interest of a co-owner, causes no harm whatsoever to the owner of other interests in the mineral lease.

K. Article 190(B)[154]

The next circumstance in which the consent of another is contemplated is in the important article on usufruct of land. Article 190(B) of the Mineral Code reads, as follows:

> Art. 190. Usufructuary of land entitled to enjoyment of mines or quarries worked; exception
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> ***

153. LA. REV. STAT. ANN. § 31:171 cmt.

154. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 9-08; *see also* M. HAMPTON CARVER, LOUISIANA MINERAL LAW TREATISE, *Chapter 13, Rights of Usufructuaries and Naked Owners in the Production of Oil, Gas and Other Minerals* § 1311 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012) [hereinafter CARVER, MINERAL LAW TREATISE].

> B. If a usufruct of land is that of a surviving spouse, whether legal or conventional, and there is no contrary provision in the instrument creating the usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals, whether or not mines or quarries were actually worked at the time the usufruct was created. However, the rights to which the usufructuary is thus entitled shall not include the right to execute a mineral lease without the consent of the naked owner.[155]

Mainly, article 190 represents a legislative expansion of the rights of the surviving spouse usufruct[156] so as to ensure that a surviving spouse has sufficient sustenance by always receiving the use and enjoyment of the landowner's rights in minerals.[157] Pertinent for our purposes is paragraph B of this article.

The last sentence of article 190(B) is arguably susceptible of differing interpretations. It is not clear whether it means that, if the lessee secures a mineral lease from the usufructuary of the type envisioned by that paragraph and from all of the naked owners, the lessee holds a valid mineral lease and is permitted to operate. On the other hand, in stating that "the rights to which the usufructuary is thus entitled shall not include the right to execute a mineral lease *without the consent of the naked owner*," it might be argued that the lessee cannot even seek to secure a mineral lease from the usufructuary unless it first secures the consent of the naked owners. In other words, one might contend that this language means that the naked owners are "keepers of the gate" through which the lessee must travel before attempting to secure a mineral lease from the usufructuary.

If the latter interpretation were valid, assume that the lessee acquires a mineral lease from the usufructuary and drills a well that produces for four years, during which time the lessee pays the usufructuary the one-fifth royalty stipulated in her mineral lease. Thereafter, the usufructuary dies. Then, the former naked owners—who are now full owners, the

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155. LA. REV. STAT. ANN. § 31:190.

156. "If the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent's share of the community property to the extent that the decedent has not disposed of it by testament. This usufruct terminates when the surviving spouse dies or remarries, whichever occurs first." LA. CIV. CODE art. 890 (2018).

157. "This deviation from traditional principles is justified in light of the solicitude for the interests of the surviving spouse." 3 A.N. YIANNOPOLOUS, LOUISIANA CIVIL LAW TREATISE: PERSONAL SERVITUDES § 2:21 (5th ed. 2011).

usufruct having been terminated by the death of the usufructuary[158]—notify the lessee that it owes them the entirety of all production after "pay-out" because the mineral lease from the former usufructuary was not valid because it had been granted "without the consent [permission] of the naked owner."[159]

To remove these issues, the lessee should cause the mineral lease to be executed jointly by the usufructuary and all of the naked owners, with an express statement on the part of the naked owners that they join for all purposes, including so as to consent to the granting of the lease by the usufructuary.

L. Article 195[160]

The Louisiana Mineral Code applies to both migratory or fugacious minerals as well as solid minerals.[161] Of interest to the person who mines for coal or lignite is the second sentence of Mineral Code article 195, which contains a consent requirement that is appropriate in view of the detrimental nature of those types of activities.

> Art. 195. Right of naked owner of land to enjoyment of minerals
>
> If a usufruct of land does not include mineral rights, the naked owner of the land has all of the rights in minerals that he would have if the land were not subject to the usufruct. The rights may not be exercised in coal or lignite which is to be produced through surface mining techniques without first obtaining the consent of the usufructuary. If the usufructuary is entitled to the benefits provided in Article 190 and 191, the rights of the landowner are subject thereto.[162]

Indicatively, the consent of the usufructuary is not required for the conduct of more traditional oil and gas E&P activities that, in contrast to mining operations, are more geographically restricted and can be less invasive, but

158. *See* LA. CIV. CODE art. 607 ("The right of usufruct expires upon the death of the usufructuary.").

159. LA. REV. STAT. ANN. § 31:190.

160. *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 9-13; *see also* CARVER, MINERAL LAW TREATISE, *supra* note 154, § 1312.

161. *See* LA. REV. STAT. ANN. §§ 31:5, 31:6.

162. LA. REV. STAT. ANN. § 31:195.

consent is necessary for the exploitation of coal and lignite, which is more destructive to the surface of the land because it involves "strip mining."[163]

II. The Form of Consent and the Standards for Granting or Withholding It

Having examined in detail the several articles of the Mineral Code that contain a reference to the need to obtain consent or that dispense with the necessity to attain such approval, it is appropriate to consider the issue of whether such consent must be in a certain form, as well as the standards for granting or obtaining consent, where consent is required.

A. Meaning of Consent

Despite the several references, the Mineral Code does not define "consent." As the Louisiana Supreme Court has noted that in "determining the 'common and approved usage'" of an undefined word, "[d]ictionaries are a valuable source."[164]

One dictionary defines consent as "to express a willingness," "give assent or approval," "compliance or approval . . . of what is done or proposed by another," or "capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action."[165] Black's Law Dictionary, the leading law dictionary, offers, as a meaning, a "voluntary yielding to what another proposes or desires."[166]

Although the meaning of consent is perhaps well understood in common vernacular—particularly when aided by the definitions provided in respected dictionaries—it is also akin to the use of the word in the formation of a contract, often stated as "uniting of the will of all of these defendants on the same points, such as is essential in the formation of a valid contract."[167]

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163. "This process of extraction, called strip mining, completely eliminates the surface owner's enjoyment of the portion of the property being mined." River Rouge Minerals, Inc. v. Energy Res. of Minnesota, 331 So. 2d 878, 880 (La. Ct. App. 2d Cir. 1976), *writ refused,* 337 So. 2d 221 (La. 1976).

164. Gregor v. Argenot Great Central Ins. Co., 851 So. 2d 959, 964 (La. 2003).

165. *Consent*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

166. *Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

167. Placid Oil Co. v. George, 59 So. 2d 120, 125 (La. 1952).

B. Implications of Public Policy as a Limitation on Rights of Contracting Parties

Although "freedom of contract" is available to the parties to a transaction involving mineral rights,[168] in the absence of any contractual intervention to the contrary, the above codal statements involving "consent" must be abided or considered.[169] The Louisiana Mineral Code robustly invokes the principle of "freedom of contract," allowing contracting parties to renounce or modify provisions of the Code, provided that "the renunciation or modification does not affect the rights of others and is not contrary to the public good."[170] Consideration must be given to the extent to which an affirmative requirement for consent represents a matter of public policy that may not be modified by a private contract.

The methodology that a court will engage to ascertain whether a contractual provision violates public policy or "affect[s] the rights of others" was explained in *Matter of Dibert, Bancroft & Ross Co., Ltd.*[171] In that case, the federal Fifth Circuit Court of Appeals considered an argument that a contractual provision in a mortgage that altered the requirements or directive of law was unenforceable as being violative of public policy. The court did not accede to that argument, explaining, as follows:

> The task of distinguishing between suppletive and imperative laws is best approached, not in an abstract inquiry into the character of a particular provision in light of the elusive concepts of public order or the public interest, but . . . by examining "the particular clause of the agreement which does away with a rule of law, and . . . ask[ing] whether the enforcement of the clause would be against public policy."[172]

168. The important principle of "freedom of contract" is addressed in Part I of Chapter Two of OTTINGER, MINERAL LEASE TREATISE, *supra* note 1.

169. *See* LA. REV. STAT. ANN. § 31:3 (2000) (Supp. 2019) ("Unless expressly or impliedly prohibited from doing so, individuals may renounce or modify what is established in their favor by the provisions of this Code if the renunciation or modification does not affect the rights of others and is not contrary to the public good."); *see also* LA. CIV. CODE art. 7 (2018) ("Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.").

170. LA. REV. STAT. ANN. § 31:3.

171. 117 F.3d 160, 173 (5th Cir. 1997).

172. *Id.* at 174.

Self-evidently, where a codal provision requires the consent of a certain third person, contracting parties may not dispense with the necessity to secure that consent without the concurrence of the party in whose favor the consent requirement inures. To obtain the consent of the relevant person is tantamount to seeking dispensation from such person.

In those instances where the text of the Code contemplates the interest of a third person, deemed by policy to be worthy of protection via a mechanism of consent, such person is somewhat analogous to a third party beneficiary in the realm of private contracts.[173] Indeed, just as in the latter context, the legitimate interests of the third person are protected by the notion of consent.

C. Form of Consent

With one exception, in the several instances where the consent of some other person is required, no modifier stipulates that consent must be in writing or be manifested in any other formality. The exception is Mineral Code article 85(5), which alludes to the royalty owner who "consents expressly and in writing to become bound by" a certain act of a servitude owner.[174]

Although not controlling, article 1927 of the Louisiana Civil Code provides the following direction on the manner in which consent might be given in the particular context of offer and acceptance that is necessary for the formation of a contract. It provides, in pertinent part:

> Art. 1927. Consent
>
> A contract is formed by the consent of the parties established through offer and acceptance.
>
> Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent.[175]

Professor Litvinoff offered the following commentary on the form of consent and how it might be found to exist, in the following words:

> No particular *form* is required for the offer or the acceptance.

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173. *See* LA. CIV. CODE arts. 1978–82.
174. LA. REV. STAT. ANN. § 31:85(5).
175. LA. CIV. CODE art. 1927.

> Either of them, the offer, as well as the acceptance of a contract, may be *express, implied* or *tacit:* express when evinced by words, either written or spoken; implied when manifested by actions; tacit when evidenced by silence or inaction, or when the circumstances of a particular situation, or a legal presumption directs the consideration of actions, silence, or inaction as evidence of consent.[176]

Express consent is permission stated in explicit written terms. Implied consent has been found to exist based upon the knowledge and actions of an actor. For example, in *Connette v. Wright*,[177] a co-owner of mineral leases was held responsible for his share of drilling costs and supervision because "execution of the division orders and the receipt of his share of the proceeds of all of the oil produced and sold was a complete ratification by defendant of the drilling operations conducted by plaintiff on the whole property."[178] This case illustrates the codal notion that a "contract is formed by the consent of the parties established through offer and acceptance" and that, in most cases, "offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent."[179]

Tacit consent of a party arises from its silence in the face of certain facts.[180] Although it did not involve a co-owned mineral lease in the absence of a contract, the federal Fifth Circuit Court of Appeals in *Caddo Oil Co., Inc. v. O'Brien* rejected arguments that a non-operating party under an operating agreement had impliedly or tacitly consented to certain operations.[181] The circumstances at issue were considered by the court, which concluded that, lacking either implied or tacit consent, the operator "cannot force [the non-operator] to invest in wells in which he does not wish to invest and to the drilling of which he did not consent."[182]

Hence, lacking any other direction in the text of the Mineral Code, a court should apply the instruction of the second paragraph of article 1927

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176. Saúl Litvinoff, *Offer and Acceptance in Louisiana Law: A Comparative Analysis: Part I – Offer*, 28 LA. L. REV. 1, 2–3 (1967).

177. 98 So. 674 (La. 1924).

178. *Id.* at 676.

179. LA. CIV. CODE art. 1927.

180. "[B]y his continued silence and failure to protest or object to its inclusion in the dray receipt, it tacitly consented thereto and cannot now be heard to repudiate its legal effect." S. States Equip. Co. v. Jack Legett Co., 379 So. 2d 881, 884 (La. Ct. App. 4th Cir. 1980), *writ denied*, 381 So. 2d 1232 (La. 1980).

181. Caddo Oil Co., Inc. v. O'Brien, 908 F.2d 13 (5th Cir. 1990).

182. *Id*. at 16.

and permit the consent under the relevant articles of the Mineral Code to be manifested or "made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent."

Although oral, implicit, or tacit consent is sufficient, the party who takes action in reliance on the consent of another party would be prudent to obtain such permission in writing, even in a simple letter format. A written document evidencing the necessary consent might serve the purpose of proof if the party whose consent is required is unavailable or "changes her mind" at a later date.

D. Filing of Consent for Recordation

Even if obtained in writing, this manifestation of consent is not required to be filed for recordation in the conveyance records. Such consent would be effective as to third persons even if not evidenced of record in accordance with article 3339 of the Civil Code, which articulates certain matters that need not be placed of record in order to be effective against third parties.

The notion of "consent," when required by the text of a relevant article of the Mineral Code, would constitute either "a matter of . . . authority" in the sense of permission, or "a similar matter pertaining to rights and obligations evidenced by a recorded instrument" for purposes of this article.[183] Consequently, the writing that evidences such consent need not be recorded and would be "effective as to a third person although not evidenced of record."[184]

Nevertheless, although not required to be filed of record, a writing that is recorded in the conveyance records will never be lost—by a weather event, office move, or fire—if ever needed at a later date when the party whose consent is required might assert the absence of consent.

E. Temporal Feature of Granting or Obtaining Consent

None of the Mineral Code articles that require the obtention of consent offer any controlling direction or limitation as to when that consent must be obtained. Therefore, the consent can be obtained at or contemporaneous with the event to be undertaken, or it can be secured at an earlier date, well prior to the future event that requires consent. Although obtaining consent at an earlier date certainly avoids conflict at the later date when the consent is needed, any such early consent should be obtained without limitation because any change in circumstance might afford an argument to be made

183. LA. CIV. CODE art. 3339.

184. *Id. See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 1-13.

that "things have changed," such that the gratuitous consent is no longer valid.

In view of the several articles of the Mineral Code that impose—or dispense with—a requirement of obtaining consent, it is important to understand the rules that regulate consent insofar as the meaning of "consent" and the form in which consent must be manifested when required. The authorities noted in Part II give context and insight to these important principles.

CONCLUSION

Article 1985 of the Louisiana Civil Code informs: "Contracts may produce effects for third parties only when provided by law."[185] Mindful of this admonition, the Redactors of the Mineral Code were thoughtful in the formulation of its articles that presented implications for parties other than two contracting persons. The mechanism employed by the Redactors when there was a need to be mindful of the effect of a contract on a third person was the notion of consent—sometimes required, other times obviated.

Since only 14 of 226 articles of the Code make any reference to consent, the general absence in the Mineral Code of any overarching requirement that a party must first obtain the consent of another party before taking action says a great deal about the latitude given to a party dealing with land or mineral rights. In those instances where the Mineral Code does contain a feature of consent, public policy recognizes that the rights of third persons are important and should be respected.

Except in one instance, the form in which consent, where required, must be obtained is not statutorily mandated, meaning that parties must go to other laws to discern how consent might be manifested. Notwithstanding the general omission of the matter of form, prudence suggests that the consent, when required, should be in writing and possibly filed of record—not because it needs to be recorded, but to ensure that, at later date when issues arise, it is locatable.[186]

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185. LA. CIV. CODE art. 1985.

186. There is yet another significant benefit to obtaining written consent and placing it of record, even though not required. If consent has been obtained and if, at a later date, the lessee seeks to sell its interest in the relevant lease, the purchaser, in the performance of due diligence, would presumably ask to see evidence of the consent where required by the Code. If it is not contained in the seller's records, or is lost, difficulties might be presented in the consummation of the transaction. But if it is obtained and placed of record, that concern would not be presented. The important topic of due diligence in connection with the purchase

The redactors of the Mineral Code are to be commended for including the notion of consent in the several contexts that are addressed by the articles in which that requirement appears. The inclusion—or dispensation—of the requirement of consent represents a thoughtful balance of interest between the party who might desire to take a certain action and the third person whose interest would be implicated without the notion of concurrence.

The policy considerations that underpin the need for consent in a particular context are valid and appropriate, and this Article has as its principal goal the attainment of a better understanding of the rationale for the obtaining of consent as a mechanism to protect and foster the interests of all parties involved in the matter.

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and sale of producing oil and gas properties is examined in Patrick S. Ottinger, *Closing the Deal in the Bayou State: The Purchase and Sale of Producing Oil and Gas Properties*, 76 LA. L. REV. 691 (2016).